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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 470

LOUIS B. ADERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Eastern District of Wisconsin wherein petitioner was found guilty of committing offenses, as charged in two counts, under Sections 88 and 80 of Title 18 of the United States Code (now 18 U. S. C. A. § 371 and §§ 287 and 1001), respectively. The Trial Court imposed a fine of $5,000 on the first count and suspended judgment and sentence on the second count, placing petitioner on probation for a period of two years; the Court of Appeals affirmed the aforesaid judgment.

Opinions Below

Neither the opinions of the Trial Court nor the opinion of the Court of Appeals for the Seventh Circuit has been officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on October 23, 1951. The time within which to petition for writ of certiorari was extended to December 10, 1951 by Mr. Justice MINTON.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Statutes Involved

See Appendix hereto.

Questions Presented

1. Whether the offense of making or causing to be made a false certificate to the Veterans Administration in connection with procuring a guarantee by that agency of a bank loan for the purchase of a home by a veteran pursuant to the Servicemen's Readjustment Act of 1944, as amended, is indictable and punishable under former § 80 of Title 18 or exclusively under § 715 of Title 38 of the United States Code.

2. Whether the indictment herein is defective in that it fails to allege adequately an agreement to cause to be made a certificate which was false and known by petitioner to be false.

3. Whether the indictment herein is deficient in that it fails sufficiently to allege the performance of overt acts by petitioner in pursuance of the alleged conspiracy.

Statement of the Matter Involved

Preliminary Statement

Pursuant to Title III, Section 501 of the Servicemen's Readjustment Act of 1944, as amended (38 U. S. C. A. § 694a), the Veterans Administration will guarantee a bank loan to a veteran for the purchase of a home if the purchase price "does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator". Petitioner, an attorney, was prosecuted herein for his alleged participation, as a broker, in a sale by a veteran and his wife (co-defendants Norton H. Pritzkow and Rosemarie E. Pritzkow) of their home to another veteran and his wife (John R. Grunert, Jr., and Alice J. Grunert) wherein the buyer-veteran procured a Veterans Administration bank loan guarantee upon the basis of a purchase price of $9,150, the appraised valuation of the property, and agreed to pay to the sellers $9,150 for the realty and $1,045 for designated items treated by the parties as personalty. In addition to petitioner and the Pritzkows, one Louis R. Potter, an attorney and the father of Rosemarie E. Pritzkow, who acted on behalf of the Pritzkows in the transaction, was named as defendant in the indictment. The Grunerts were not named as parties; they testified as witnesses on behalf of the prosecution. At the conclusion of the prosecution, the indictment was dismissed as against Potter. At the conclusion of the entire case the remaining defendants were each found guilty as charged. Petitioner alone appealed to the Court of Appeals for the Seventh Circuit and he alone seeks review upon the instant petition for writ of certiorari.

The Indictment

The first count in substance alleges a conspiracy under former § 88 of Title 18 charging all of the above defendants with a conspiracy to cause the North Avenue Federal Savings and Loan Association of Milwaukee to make and use a false certificate containing fictitious statements and entries for the purpose of inducing the Veterans Administration to guarantee a loan to Grunert by causing the Loan Association to certify to the Veterans Administration that a certain home known as 3751 South 20th Street, Milwaukee, was sold by Pritzkow and his wife to Grunert and his wife for the total cost of $9,150; and causing the Loan Association to certify further to the Veterans Administration that the price does not exceed the reasonable value determined by the property appraisal made by an appraiser designated by the Administrator. It is further alleged that the parties knew said certification to be fraudulent and fictitious in that the total cost to be paid for said home was not $9,150 but to the veteran it was to be $10,195; that the overpayment was by trick, scheme and device by obtaining from Grunert a chattel mortgage as if on personal property upon such items as, among other things, kitchen sink, cabinets and furnace; that the object of the conspiracy was accomplished by the Pritzkows agreeing to sell said home to the veteran for a cost of $9,150 and all of the parties did prepare and execute the necessary documents to effectuate the sale to the veteran; that in order to obtain an additional sum of $1,045 in addition to the agreed price of $9,150, the Pritzkows executed a bill of sale to Grunert upon such items as kitchen sink, cabinets and furnace and they did receive from said Grunert a promissory note secured by said chattel mortgage; and that they did conceal from the North Avenue Federal Savings and Loan Association the additional pay-

ment so exacted. The alleged overt acts cited against petitioner are:

(1) That he demanded and received from Grunert $100 earnest money, upon the offer to purchase the property for $9,150.

(2) That he demanded and received from Grunert $900 as additional down payment upon said offer to purchase the property for the sum of $9,150 and signed a receipt therefor.

(3) That the bill of sale which consisted of 13 venetian blinds, 8 screens, 2 storm doors, 14 storm windows and sash, 5 kitchen cabinets 1 kitchen sink and cabinets and 1 gas unit, was witnessed by petitioner and acknowledged by petitioner as a notary public.

(4) That petitioner and Potter were witnesses to the chattel mortgage.

The second count is brought pursuant to former § 80 of Title 18 and charges that petitioner together with the other defendants caused the Loan Association to make and use a false certificate knowing the same to contain fictitious statements and entries and that they did cause the Loan Association to certify to the Veterans Administration that the said home was being sold to Grunert for the total cost of $9,150 and that the price paid or to be paid by Grunert for such property or for the cost of (1) construction, (2) repairs, (3) alterations and (4) improvements, did not exceed the reasonable value determined by the administration's appraiser; that they knew said certification to be fraudulent and fictitious and that the total cost to be paid therefor was to be $10,195; and that the said overpayment was by the trick, scheme and device of obtaining from Grunert a chattel mortgage as if on personal property.

The Trial

The transcript of the trial, which is filed in its entirety upon this petition, is confusing because of the extraordinary conflict in the testimony. No useful purpose can be served at this stage of the prosecution in analyzing in detail the various versions of the transactions here in issue. We think that a reading of the record will make it abundantly clear that petitioner's testimony is the most forthright, plausible and credible of the divergent recitations. Accordingly, the statement here proffered is based primarily upon the testimony of the petitioner.

Before particularizing the fact situation, however, it is appropriate to indicate that it is not disputed that the appraisal made by the Veterans Administration came to $9,150; that Grunert advised the lending institution that he was paying $9,150 for the house he was purchasing; and that the Grunerts agreed to pay to the Pritzkows $9,150 for the realty and $1,045 for certain designated items of personalty. These undisputed facts did not, however, constitute an offense against the laws of the United States* and did not comprise the offense for which the instant prosecution was brought. Tie-in sales were, at the time of the transaction, permissible. The additional factor upon which this prosecution is predicated is the alleged fraudulent concealment by the buyers and defendants of the tie-in sale of property which the parties intended and treated as personalty—and properly so under the applicable state

* Cf. Public Law 142, 82nd Cong., 1st Sess., enacting H. R. 319 to amend Title III of the Servicemen's Readjustment Act of 1944 by adding a new Section 503A to provide that in the event of a sale of property "for a consideration in excess of the reasonable value of such property as determined by proper appraisal made by an appraiser designated by the Administrator," where the Veterans Administration has guaranteed a bank loan made in connection with such sale, any participant in such a transaction is liable to treble damages.

law*—but which the Veterans Administration included in its appraisal of the realty. In this connection petitioner submits that there is lacking any direct evidence that petitioner overtly or covertly participated in any such fraudulent concealment: the purchase price information contained in the loan application form—the specific instrument as to which it is claimed in the indictment that fraud was committed—was supplied by Grunert (Tr. 25)** and though a Government witness, Grunert never testified that petitioner even suggested concealment of the total price to be paid.*** In the only two instances in the record wherein it was directly testified that any defendant was responsible for concealment (Tr. 18-19; 88, 102, 225), there is a total absence of any connection between petitioner and such concealment (Tr. 42; 180). The record is therefore bare of any direct testimony or evidence that petitioner concealed or caused to be concealed the tie-in sale.

The testimony, viewed chronologically, showed the following:

In July of 1947, in answer to an advertisement by the Adams Realty Co., the trade name of petitioner, Rosemarie E. Pritzkow telephoned that her home was for sale (Tr. 336, 557), and Mrs. Alice Drews as the agent for Adams Realty Co. obtained a written listing for the sale (Tr. 336, 384, 410, 558, 644). Petitioner was at no time in that home nor did he ever see it (Tr. 558).

The veteran, Grunert, and his wife, were shown the home by Mrs. Drews, manifested an interest, and agreed to buy it for $10,500 with $1,000 down, subject to "G.I.

* See *Lindoft* v. *Vandenburg*, 201 Wisc. 330; *E. M. Fish Co.* v. *Young*, 127 Wisc. 149; *Rinzel* v. *Stumpf*, 116 Wisc. 287.

** The transcript of the testimony is hereinafter referred to as "Tr."

*** When Grunert was asked on cross examination why he did not advise the lending institution of the additional payment to be made for designated items of personalty he affirmed " 'Well, for the simple reason that I didn't know what the whole thing was about, that is, as to whether they should know this or anything like that' " (Tr. 225, 226).

financing" (Tr. 144, 150, 157-159, 242, 559). They were then told by petitioner that the house would have to be appraised by the Veterans Administration and the price would be fixed by the appraiser (Tr. 112, 181-183, 626). A tentative written offer to purchase the home for $10,500, subject to "G.I. financing", was then made by the Grunerts (Tr. 70, 159, 559).

Kathleen Clark, the assistant secretary of the Savings and Loan Association, was informed of such offer and petitioner requested that she have a V. A. appraisal made (Tr. 4, 8, 26, 32). Pritzkow, who is also a veteran of World War II, had purchased the house on a combined F.H.A.-G.I. priority financing plan (Tr. 260, 300, 403). At the time the Pritzkows bought the house it was without improvements (Tr. 272-273); but after the purchase Pritzkow and his wife installed aluminum storms and screens, aluminum venetian blinds, gas unit, kitchen steel cabinets and a kitchen sink, and they paid for these improvements in addition to the price they had paid theretofore for the real estate (Tr. 270-273, 284-285). Before they sold their home to Grunert, the Pritzkows submitted a detailed letter to the F.H.A. specifying the price they had paid for the real estate and for the improvements; they received written permission from F.H.A. to sell the house and improvements for no more than $9,710, plus 5% commission to the broker handling the deal, totalling $10,195.50 (Tr. 267-270, 289, 332-333, 396). Later Miss Clark informed petitioner that the V. A. appraisal of the house was $9,150, but he was not informed as to what the appraisal included or covered (Tr. 561, 595, 641-642).

Shortly after learning about the V. A. appraisal, Grunert came to petitioner's office and was told by petitioner that the house was appraised at $9,150 and if he was to buy it with V. A. financing he could not pay over $9,150 but that if there was personal property that was a matter of

separate purchase, he being permitted to buy personal property apart from the real estate at a price agreed between him and the Pritzkows (Tr. 192, 194-196, 565, 627).

Mrs. Pritzkow had informed the petitioner that her father, Louis R. Potter, was an attorney and would represent her and her husband in the sale of the home (Tr. 562, 565). Up to that time petitioner had not known Mr. Potter (Tr. 562).

Petitioner informed Potter that the V. A. appraisal of his daughter's home was $9,150 and that was the top price the buyers could pay, but that the buyer-veteran and his wife were willing to buy personal property from the Pritzkows on terms they were to agree upon (Tr. 566). It was then that Potter informed petitioner that the Pritzkows had personal property to sell and that petitioner could have Grunert, the veteran, sign an offer to purchase the real estate for $9,150 and personal property for $1,045 which would include the articles to be itemized later (Tr. 566, 568). Potter explained to petitioner that the Pritzkows had F.H.A. permission to sell their home with improvements including venetian blinds, together with broker's commission for $10,195; the real estate to be sold for $9,150 and the personal property, a list of which he would give petitioner later, for $1,045 (Tr. 604-606).

Grunert signed an offer to purchase the real estate for $9,150, subject to "G.I. financing," and an offer to purchase venetian blinds and such other personal property to be left by the sellers to be paid in monthly payments of $25, including interest at 4% (Tr. 159, 184, 192, 197, 242-243, 567). Grunert expressed satisfaction with said propositions except that he preferred to have the monthly payments reduced (Tr. 567). Thereupon Potter enumerated the items to be sold by the Pritzkows as personal property, to-wit: venetian blinds, screens, storm doors, sash, kitchen cabinets and a gas unit (Tr. 568, 628, 641). Petitioner then

questioned Potter as to whether the items other than the venetian blinds could be considered personal property (Tr. 568). Potter vigorously and authoritatively contended that the intentions of the parties and not the attachment of the fixtures to the real estate determined whether such fixtures are treated as personalty; that the Pritzkows had purchased these items previously apart from the real estate and that they had considered same as personal property and their intentions were to sell same as such; Potter then substantiated his position with cases of the Supreme Court of Wisconsin which he claimed held that it was solely a matter of intention of the parties (Tr. 463, 515, 568, 570, 690).

The following night the Grunerts, their two young children, the Pritzkows, Potter, and Mrs. Drews met with petitioner and his secretary, Theresa Stranzel, in petitioner's office to consider the terms of the deal (Tr. 659, 664). After reading the Wisconsin Supreme Court cases cited by Potter and relying upon those cases and Potter's self-professed expertise on the subject, petitioner proceeded with the deal as outlined by Potter. Potter thereupon requested that Grunert give a chattel mortgage on the personal property and a second mortgage on the real estate as security for the $1,045 to be paid for the personal property; the same to be evidenced by two promissory notes to be payable in monthly installments of $20 (Tr. 570-571, 604, 629). The Grunerts then accepted and signed the revised offer to purchase the personal property.

All, including "his kids," accepted Potter's utterances and, relying thereon, proceeded to sign the contracts (Tr. 277, 295, 470, 618-619). The Grunerts as well looked to Potter for guidance in the deal, and then and there Pritzkow declared that Potter would look after the interests of both parties (Tr. 186, 246).

On November 6, 1947, Mrs. Pritzkow brought to the petitioner the title policy and deed to their home (Tr. 358-359, 576). The petitioner then ordered a new owner's policy in the sum of $9,150 (Tr. 577).

On November 7, 1947, Grunert applied to Miss Clark at the North Avenue Federal Savings and Loan Association for a V. A. guaranteed loan of $8,150 stating in his application that he was paying $9,150 for the real estate and intended to make a down-payment of $1,000 towards the purchase price (Tr. 12-15, 24-25, 154). His application was approved (Tr. 14).

Miss Clark notified the petitioner that the Savings and Loan Association would give a loan to Grunert for $8,150 (Tr. 14). After petitioner had received the preliminary report of the title policies, he then arranged with Miss Clark and the interested parties to close the deal at the North Avenue Federal Savings and Loan Association on Friday, November 28, 1947 at 2:00 o'clock P. M. (Tr. 579-581).

At Potter's direction, so that Pritzkow would not have to lose time from his job, the papers in the transaction were to be signed on November 27, 1947 (Tr. 58, 608, 642). The petitioner arranged to have the Grunerts and Pritzkows meet in his office on Thanksgiving night, Thursday, November 27, 1947 (Tr. 73-74, 584). At that time Potter agreed to reduce the monthly payments on the personal property to $15 a month (Tr. 629).

On that night, the following papers were signed, to-wit: the deed, second mortgage, chattel mortgage, bill of sale, and the two notes. The closing statements were ready. Potter then directed that the bill of sale list the number of each item of personal property specifically (Tr. 584); and petitioner made the required changes in ink of the bill of sale and chattel mortgage at the dictation of

Potter (Tr. 340-341, 584). All of the parties, including Potter, examined the closing statements, and all of the papers were signed as Potter directed (Tr. 75, 85, 151-152, 244, 616). Petitioner handed Potter the signed chattel mortgage and second mortgage; the second mortgage was not to be recorded until the Loan Association's mortgage was first recorded (Tr. 299, 487-488, 586, 613, 635-636). It was also agreed that the Grunerts and Mrs. Pritzkow would meet petitioner at the Loan Association at 2:00 P. M. the following day (Tr. 585).

At the appointed time, Mrs. Pritzkow, Mr. Grunert and petitioner were there (Tr. 586). Mrs. Grunert arrived later. The parties proceeded with the closing of the real estate deal without her (Tr. 586). Petitioner gave Miss Clark a copy of the closing statement as to the real estate. It showed that the selling price was $9,150 (Tr. 16, 19, 42). She got $10.45 for the required revenue stamps which she then pasted on the deed (Tr. 18, 20-21).

At the behest of Miss Clark, Grunert signed a number of required documents and papers and endorsed checks (Tr. 95, 586, 601). After Mrs. Grunert arrived, Miss Clark then had her sign the required documents and papers and endorse checks (Tr. 94-95, 586-587). Mrs. Pritzkow received her money (Tr. 23, 348). Petitioner received the amount of the commission authorized by F. H. A. and left the Grunerts and Mrs. Pritzkow at the office of the Association (Tr. 87, 325).

On or about December 3, 1947, Miss Clark or one of her assistants at the Loan Association completed a form known as a Home Loan Report (identified in the indictment as "V. A. Form 4-1820 February 1946"), which Mr. Grunert had previously signed in blank, and mailed it to the Veterans Administration (Tr. 17, 30-31, 36, 38, 40, 147). The existence and contents of this form was first learned of by the petitioner after his arrest in 1948.

This report was received by the Veterans Administration on December 8, 1947 (Tr. 30, 64).

During the early part of 1948 monthly payments were made by the Grunerts for the personal property purchased by them as aforesaid (Tr. 172, 325, 515-516, 588-589). When payments ceased, Potter commenced a replevin action against the Grunerts on behalf of the Pritzkows to recover the personal property listed in the chattel mortgage (Tr. 361, 385); the Grunerts counter-actioned with a suit enjoining the replevin action and both the aforesaid actions remain presently pending (Tr. 137, 184). Thereafter, and on May 9, 1949, the instant indictment was presented. A trial was had on the indictment before District Judge ROBERT H. TEHAN, a jury having been waived by the defendants. As has been indicated, at the conclusion of the prosecution the indictment was dismissed as to the defendant Potter; at the conclusion of the entire case each of the defendants was found guilty as charged and the defendants, other than petitioner, received suspended sentence and judgment and were placed on probation for 18 months; and, further, at the end of the entire case the trial judge referred the testimony of Potter, offered on behalf of the defendants Pritzkow, to the attention of the District Attorney for prosecution as perjury (Tr. 719, 720).

Specification of Errors

1. It was error for the Court of Appeals for the Seventh Circuit to affirm the order of the Trial Court denying petitioner's motion to dismiss the indictment.

2. It was error for the United States Court of Appeals for the Seventh Circuit to affirm the judgment of conviction of the Trial Court.

Summary of Argument

The indictment was laid under the former § 80 of Title 18, which states it to be a felony to make or cause to be made a false certificate in any matter within the jurisdiction of an agency of the United States, and under the former § 88 of Title 18, which makes it a felony to conspire to commit an offense such as that comprehended within the former § 80. All of the material elements of the crime here charged come as well within a later special statute, § 715 of Title 38 of the United States Code, which defines the acts charged to petitioner to be a misdemeanor subject to lesser maximum penalties than those authorized and imposed upon petitioner herein under former §§ 80 and 88. We think it clear that it was the legislative intent, when the Congress adopted § 715 specifically with respect to the commission of fraud in the filing of the kind of certificate which is here involved, that the penal provisions of § 715 would be exclusively applicable. And we think it unlikely in the extreme that by enacting § 715 Congress intended merely to supply grand jury and prosecutor with a choice of penalties* for the offender of that statute rather than to define precisely and exactly the maximum punishment to be meted out to such a malfeasant. The decisions of this Court and of other Circuits in circumstances substantially identical with those which here obtain have held that a special later statute, as § 715, repeals by implication an earlier general statute, as former § 80, where as here different and inconsistent penalties are provided.

The indictment is also defective with respect to the conspiracy count in failing to allege sufficiently a principal element of the offense charged, *i. e.*, an agreement to cause

* It was, of course, unnecessary to enact § 715 to authorize a sentencing judge to impose the lesser penalties of § 715 as compared with those of former § 80.

to be made a certificate which is false and known by the defendants to be false; similarly the indictment is deficient in that the overt acts alleged therein are not acts in pursuance of the charged conspiracy. In both of the foregoing respects the conspiracy count violates the mandate contained in decisions of this Court with respect to conspiracy indictments.

REASONS RELIED ON FOR ALLOWANCE OF WRIT AND ARGUMENT IN SUPPORT

I

The refusal of the Court of Appeals for the Seventh Circuit to dismiss the indictment and/or reverse the judgment of conviction of the Trial Court on the grounds that the indictment was erroneously returned under former Sections 80 and 88 of Title 18 of the United States Code was in conflict with the decisions of this Court and of the Courts of Appeals of other Circuits.

The alleged acts of the petitioner set out in count II of the indictment constitute an offense under § 715 of Title 38 of the United States Code. The said § 715 applies to "any person who shall knowingly make or cause to be made * * * a false or fraudulent * * * certificate * * * concerning any claim for benefits under" various designated statutory provisions appertaining to the special rights and benefits accorded to veterans. § 715 was expressly incorporated by reference as part of the Servicemen's Readjustment Act of 1944, as amended, by § 697(a) of Title 38 and it was pursuant to the latter Act that the certificate here alleged to be fraudulent was made. Accordingly it has on several occasions been held that acts identical to those alleged to have been committed by petitioner herein are

comprehended by and punishable under the provisions of § 715 [*Young* v. *United States*, 178 F. 2d 78 (C. A. 9), *cert. den.*, 339 U. S. 913; *Karrell* v. *United States*, 181 F. 2d 981 (C. A. 9); *United States* v. *Selph*, 82 F. Supp. 56 (S. D. Cal.); *United States* v. *Oakland*, 81 F. Supp. 343 (W. D. La.); *Young* v. *Hampton*, 36 Cal. 2d 799, 803-806]; indeed, in the light of recent representations by the Veterans Administration and Department of Justice to the Congress concerning the inadequacy of prosecutions under § 715 for offenses such as are here alleged (see 82nd Cong., 1st Sess., S. Rep. 642, H. Rep. 235), we think it will be conceded that the acts here complained of could have been prosecuted under § 715.

We turn then to the question whether the offenses here alleged may be prosecuted only under § 715, or whether it rests in the discretion of the grand jury and prosecuting official to prosecute an offender for a felony under former § 80 of Title 18 or a misdemeanor under § 715.

Neither § 715 nor any other provision in the Servicemen's Readjustment Act of 1944, as amended, contains an express repeal of the former § 80 of Title 18. If there has been any repeal of the former § 80 by § 715, in whole or in part, such repeal is worked by implication. Such repeal by implication is, of course, a matter of legislative intent. *United States* v. *Gilliland*, 312 U. S. 86, 95-96; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Borden Co.*, 308 U. S. 188, 198; but see *United States* v. *Claflin*, 97 U. S. 546, 549; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27.

The legislative history of § 715 provides no clue to the legislative intent with respect to the foregoing. When the Congress enacted § 715 into law in 1933 there was no discussion concerning the intended scope of § 715 except to indicate that it was intended to carry over the penalty provisions which had theretofore obtained in earlier vet-

erans' legislation (73rd Cong., 1st Sess., 77 C. R. 254, 584). The earlier legislation thus carried forward by § 715 may refer to the provisions in §§ 126, 555, 682, and 688a of Title 38. Each of these sections imposes designated penal sanctions for the making of a fraudulent certificate to procure the benefits accorded to veterans by the general legislation in which those sections are to be found. See also 38 U. S. C. A. § 815. While isolated references to the foregoing provisions may be found in the Congressional hearings, reports, and debates had in connection therewith,* petitioner has been unable to find in the legislative history examined any significant discussion or consideration of the intended repealing effect of the cited sections. There is, however, no such lack to be found in the decisions of this Court and the Courts of Appeals of various Circuits in the definition of the necessary legislative repealing intent of statutes bearing a relationship comparable to that between the former § 80 and § 715. Before examining those cases it will be appropriate to recall that while the material elements of the offense are identical in both § 715 and former § 80, § 715, the more recent of the two statutes, defines the offense therein comprehended as a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both; the former § 80, on the other hand, is definitive of a felony punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both.**

* See, *e. g.*, 68th Cong., 1st Sess., 65 C. R. 10162, 10170, 11013; 68th Cong., 2d Sess., 66 C. R. 5454; Hearings before House World War Veterans Legislation Committee on Proposed Legislation and H. R. 10271, 68th Cong., 2d Sess., pp. 94-95, 100.

** If error was committed in the indictment of petitioner under former § 80 instead of § 715 of Title 38, that error is prejudicial not only with respect to the substantive count of the indictment for which petitioner was penalized in excess of the maximum punishment authorized by § 715, but also in connection with the conspiracy count for if the offense is a misdemeanor only, then punishment for a conspiracy to commit a misdemeanor may not exceed the maximum punishment provided for such misdemeanor. 18 U. S. C. A. § 371; see also Moscowitz, "Trial of a Criminal Case in the Federal Court," 3 F. R. D. 380, 392-393.

The starting point of any discussion of the effect of § 715 upon the former § 80 is *United States* v. *Tynen*, 78 U. S. (11 Wall.) 88. There an earlier statute declared to be a felony the act of falsely making and using a certificate of citizenship and provided as punishment for the offense imprisonment of not less than three nor more than five years or a fine of not less than $500 nor more than $1,000; a later statute condemning like fraudulent actions, together with other acts of a fraudulent character in connection with naturalization, declared such acts to be criminal and punishable by fine of between $300 and $1,000 and/or imprisonment of between one and five years. Mr. Justice FIELD thereupon set out the classic formula for ascertaining whether a repeal by implication has been worked:

> "There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act" (78 U. S., 92).

Thereafter it was concluded that there was such repugnancy between the two statutes and that the latter repealed by implication the former for the following reasons:

> "Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing

declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1879 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.

Again, the act of 1913 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done" (78 U. S., 92-3).

The foregoing criteria employed by this Court in *United States* v. *Tynen* have again and again been employed in instances where it was found that a latter statute, because similarly repugnant to provisions of a former statute, repealed such former statute by implication. *Murdock* v. *Memphis,* 87 U. S. (20 Wall.) 590; *United States* v. *Claflin, supra; King* v. *Cornell,* 106 U. S. 395; *Pana* v. *Bowler,* 107 U. S. 529; *United States* v. *Fisher,* 109 U. S. 143; *United States* v. *Auffmordt,* 122 U. S. 197; *Tracy* v. *Tuffly,* 134 U. S. 206; *District of Columbia* v. *Hutton,* 143 U. S. 18; *Henrietta Mining & M. Co.* v. *Gardner,* 173 U. S. 123; *The Paquete Habana,* 175 U. S. 677; *Murphy* v. *Utter,* 186 U. S. 95; *Chase* v. *United States,* 256 U. S. 1; *United States* v. *Yuginovich,* 256 U. S. 450.

It will be immediately appreciated that as in *United States* v. *Tynen, supra,* there is here a repugnancy between § 715 and the former § 80: here, as there, one statute permits the imposition of a fine in excess of the maximum fine allowed under the other statute; and, further, here, as there, one statute permits the imposition of a sentence of imprisonment in excess of the maximum imprisonment

allowed under the other. If it be thought that *United States* v. *Tynen* is distinguishable because here the latter statute provides for a lesser penalty while in *United States* v. *Tynen* the latter statute provided for a greater penalty, then it should be noted that in the decision of Mr. Justice FIELD, the following appears:

> "In *Rex* v. *Davis* [1 Leach (C.C.) 271] it appeared that there were two statutes against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony" (78 U. S., 93-94).

Moreover, this Court has held repugnant to a former statute a later statute which provided, in part at least, a lesser penalty for the same offense. Thus in *United States* v. *Auffmordt,* 122 U. S. 197, 209, it was said:

> "The latter section * * * leaves out a forfeiture of the value of the merchandise, and forfeiture of such value is inconsistent with the terms of § 12, and is, therefore, repealed by it. The absolute forfeiture of the merchandise, provided for by § 12, is inconsistent, also, with the alternative forfeiture of the merchandise or its value, provided for by § 2864. The provisions of the two statutes cannot stand together."

See also *United States* v. *Yuginovich,* 256 U. S. 450, quoted and discussed *infra* at page 26.

Similarly, numerous Circuits have held an earlier general penal statute repealed by implication by a latter special penal statute with respect to acts comprehended by both statutes—and this in instances where the latter statute provided for a lesser penalty. In *Wechsler* v. *United*

States, 158 F. 579 (C. A. 2), the question was whether the giving of false testimony in a bankruptcy proceeding was an offense under the earlier general federal perjury statute, prescribing imprisonment for not more than five years, or punishable as an offense under a special provision of the later bankruptcy act appertaining to such cases which carried with it a lesser penalty. The Court held the later statute to repeal by implication the former:

> "We have then an offense covered by two penal sections; the earlier imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty. * * *
>
> "It is suggested that we are not to conclude that Congress could have intended to reduce the punishment of persons who made false oaths in bankruptcy proceedings below that prescribed for others who made such oaths elsewhere, since all false oaths are morally wrong. The relative adjustment of punishments is, however, one wholly for the regulation of Congress, and this is not the first instance in which that body has introduced similar discriminations into the statutory penal law. The making

> of a false oath in applying for a pension would be within the provisions of section 5392, but it is specially provided in section 4746 [U. S. Comp. St. 1901, p. 3279] that for that offense the punishment shall be imprisonment not more than three years or a fine not to exceed $500, or both. So, too, the making of a false affidavit on making an entry of imported merchandise would be perjury under section 5392, but by section 9 of the customs administrative act of 1890 (Act of June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]), the maximum penalty for such offense is two years' imprisonment or a fine of $5,000, or both. In like manner section 5395, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3654], provides that where an oath or affidavit is made or taken under or by virtue of any law in relation to the naturalization of aliens, or in any proceeding under such laws, any person taking such oath or affidavit who knowingly swears falsely shall be punished by imprisonment of not more than five years or less than one year, and by a fine of not more than 1,000'' (158 F., 581, 582).

The decision of the Second Circuit in *Wechsler* v. *United States* has been followed by the Sixth Circuit (*Ulmer* v. *United States,* 219 F. 641, 647-648), and the Eighth Circuit (*Rosenthal* v. *United States,* 248 F. 684); it was adhered to by the Second Circuit as late as 1945 (*Morris Plan Indus. B.* v. *Finn,* 149 F. 2d 591, 592) and has, indeed, been codified by the new § 1621 of Title 18 which prescribes as punishment for perjury a fine of not more than $2,000 and/or imprisonment for not more than five years "except as otherwise expressly provided by law".

The same doctrine has been followed by the Second Circuit in bribery prosecutions, viz.: *Curione* v. *United States,* 11 F. 2d 471, 472. It was there held:

> "Curione was proven as guilty of transgressing this statute as he was of violating section 39. The Tariff Act declares an offense under it to be a misdemeanor,

while bribery, under section 39, is a felony by section 335 (Comp. St. § 10509); further, the punishment under section 39 may be, and in this instance was, greater than that imposed by the Tariff Act. Curione was sentenced under section 39.

We think it plain that, even without laying any weight on the usual repealer contained in the Tariff Act (section 644 [Comp. St. Ann. Supp. 1923, § 5841i3]), that statute has repealed the general bribery section, so far as the actual or attempted corruption of customs officials is concerned, by the means and for the purposes described in section 601. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153."

As Judge ROGERS declared for the Second Circuit in *Maresca* v. *United States*, 277 F. 727, 728, *cert. den.*, 257 U. S. 657:

> "There cannot be two different penalties for the same offense. The rule is well settled that, where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and repeals the former, and this whether the penalty is increased or diminished."

Accord:

> *Bruno* v. *United States*, 289 F. 649 (C. A. 1);
> *Farley* v. *United States*, 269 F. 721 (C. A. 9).

We think that it should be noted, too, that in those cases where prosecution, for acts of which petitioner is here accused, was laid under § 715, it was indicated that that section is exclusive in operation of the former § 80. In *United States* v. *Oakland*, 81 F. Supp. 343, 344 (W. D. La.), it was said of § 715:

> "Whatever may be said as to other offenses under the Act of June 22, 1944, a false statement of the character charged in the bill clearly falls under and

only under the last quoted statute, which, in effect, is made part of the said World War II Veterans Act of June 22, 1944."

And similarly in *Karrell* v. *United States*, 181 F. 2d 981 (C. A. 9), and *United States* v. *Selph*, 82 F. Supp. 56 (S. D. Cal.), reference is made to the special provisions of § 715 which make that section peculiarly and exclusively applicable to the offense here charged.

The foregoing uniform line of cases with which the decision of the Court of Appeals for the Seventh Circuit is plainly and irrevocably in conflict is not affected by the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86, cited and relied upon by the court below. For in that case the alleged conflict was between the former § 80 and § 715(e) of Title 15 which latter statute provides generally for the punishment of the violation of any provision of the "Hot Oil" Act. Clearly such a statute, not expressly or directly aimed at punishment of the making of a fraudulent certificate, works no partial or other repeal of the general fraud statute which is the former § 80. Moreover, the legislative history of the former § 80 set out by the then Chief Justice HUGHES in *United States* v. *Gilliland*, *supra*, was overwhelmingly to the effect that the Congress intended in its amendment to the former § 80 in 1934 to comprehend within that section precisely the kind of offense for which the prosecution was there brought.

It is suggested, however, by the court below that § 715 by its terms, is intended to be non-exclusive. For this proposition reference is made to the language in § 715 which states that the offender, "in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor . . .". Petitioner respectfully submits that any construction of § 715 which imports into that section by the foregoing language the former § 80 is not permissible. For the term "in addition" is literally and in the context

of § 715 cumulative. It does not mean that the offender is guilty in the alternative, of a misdemeanor and may be punished for such offense "or for any and all other penalties"; it says and means that he shall be punishable for a misdemeanor and shall suffer the punishment therefor "in addition to any and all other penalties imposed by law". That the language "in addition" is intended to be cumulative is conclusively demonstrated by the recent amendment to the Servicemen's Readjustment Act wherein it is provided that treble damages may be recovered for any overcharge and "the remedy provided in this section shall be in addition to any and all other penalties imposed by law" (Public Law 142, 82nd Cong., 1st Sess.). The remedy thus added to the Servicemen's Readjustment Act of 1944, as amended, is cumulative to the other remedies therein provided, not an alternative to those remedies, and the Congress thereby indicated that when it used the term "in addition" in the Servicemen's Readjustment Act it intended a remedy or penalty cumulative to other existing remedies or penalties.

Of course, it will hardly be contended that it was the intent of Congress to make an offense defined under § 715 punishable cumulatively as a felony under former § 80 and as a misdemeanor under § 715. Much more likely is the intention of the Congress to impose a softer, lighter, penalty for fraud within the framework of a statutory pattern established for the alleviation of the veteran subject to the provisions of § 715. Moreover, if the cognate provisions of §§ 711-716 of Title 38 be examined it becomes abundantly clear what the Congress meant when it created a misdemeanor for fraud "in addition to any and all other penalties imposed by law". Those other sections define other offenses, such as perjury (§ 712), fraudulent receipt of benefits (§§ 713 and 714), and embezzlement (§ 716), in connection with the administration of veterans' benefits and prescribe designated penalties for each such offense. The

punishment under each of these provisions other than § 715 is fine and/or imprisonment; only in § 715 is it expressly provided that the veteran is also deprived of rights and benefits as a veteran; and only in § 715 does there appear the clause "in addition to any and all other penalties imposed by law". Similarly, in those other sections specially penalizing the making or using of a false certificate to procure veteran-benefits, the clause "in addition to any and all other penalties imposed by law" will be found where, as in § 715, provision is also made for the loss of such benefits (38 U. S. C. A. § 555) and the clause is absent where no provision is made therein for loss of such benefits (38 U. S. C. A. §§ 126, 682, 688a, 815). Petitioner submits that the foregoing statutory pattern explains the unique language in § 715—the clause "in addition to any and all other penalties imposed by law" is intended to mean that the offender of § 715 is subject to penalties for the commission of a misdemeanor in addition to the loss of benefits as may be provided in § 715 or any other section of the law.

If any decision of this Court is required to demonstrate the plain error in considering that the clause "in addition", etc., saves the former § 80 from the repealing effect of § 715, that authority is supplied by *United States* v. *Yuginovich*, 256 U. S. 450. See also *District of Columbia* v. *Hutton*, 143 U. S. 18. In the *Yuginovich* case an earlier statute (referred to in the opinion as § 3257) made it a crime to defraud or attempt to defraud the United States of a tax upon spirits distilled by one carrying on the business of a distillery, and imposed a penalty therefor of a fine of not less than $500 or more than $5,000 and imprisonment of not less than six months or more than one year; the later Volstead Act (referred to in the opinion as § 35) imposed a tax upon the illegal manufacture of spirits in an amount double that provided by law with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. In writing for the Court Mr. Justice Day held:

"The question remains concerning the applicability of § 3257, involving the right to punish for attempting to defraud the United States of a tax, Did Congress intend to punish such violation of law by imposing the old penalty denounced in § 3257 or as provided in the new and special provision enacted in the Volstead Act?

It is the contention of the government that § 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes: '. . . nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.'

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States* v. *Tynen*, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty. The concluding phrase of § 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the 18th Amendment and in view of the provisions of the Volstead Act intended to make that Amendment effective.

Having in mind these principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the Government of the revenue tax, we do not believe that the general language used at the close of § 35 evidences the intention of Congress to inflict for such an offense the punishment provided in § 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under § 35 enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers" (256 U. S., 462-463).

Petitioner thinks it clear almost beyond dispute that in the light of the foregong authorities the decision of the Court below is in irreconcilable conflict with the holdings of this Court and those of other Courts of Appeals. Petitioner is, however, aware of the injunction by this Court that certiorari will not issue solely because error has been committed—even if, as here, the error is prejudicial. Mr. Chief Justice Vinson advised the practitioners before this Court, in his address to the American Bar Association on September 7, 1949 (70 Sup. Ct. Adv. XII, XIV), that for certiorari to be granted the questions involved must have importance "beyond the particular facts and parties involved". We submit that the issue under the instant heading is such a question. For there is involved not only the rule of law to be applied in the numerous prosecutions which have arisen out of the sale of realty to veterans who have procured Veterans Administration guarantees of bank loans, but in addition there is here involved the broader question of the effect to be accorded the various special statutory provisions for punishment in designated contexts of offenses comprehended within earlier, general penal statutes (see, *e. g.*, 18 U. S. C. A., chap. 11, 15, 47). Such questions, we submit, are of a breath and genre sufficient to invoke consideration and decision by this Court.

II

The decision of the Court of Appeals for the Seventh Circuit affirming the judgment of conviction by the Trial Court and refusal of the Trial Court to dismiss Count I of the indictment on the grounds that it fails to allege sufficiently the elements of an offense was error and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hamner* v. *United States*, 134 F. 2d 592.

Count I of the indictment purports to allege a conspiracy to commit the offense against the United States

proscribed by the former § 80 of Title 18. It is, of course, elementary as well as provided by statute that the gist of a conspiracy charge is an agreement "to commit . . . [an] offense against the United States" (18 U. S. C. A. § 371). It is therefore encumbent upon the pleader to allege clearly and unambiguously an agreement to commit acts which constitute an offense. Here the pleader alleges in a conclusory form an agreement to cause the making and use of a false certificate; he then proceeds to allege an agreement to cause the Loan Association to certify to the Veterans Administration that the Pritzkows' property was being sold to the Grunerts for $9,150 and thereafter, instead of alleging any agreement or conspiracy with respect to the falsity of said certificate, recites that the parties knew the certificate to be "fraudulent and fictitious" and effected overpayment "by a trick, scheme, and device".

Petitioner submits that an indictment thus drafted is insufficient under the authority of *Hamner* v. *United States*, 134 F. 2d 592 (C. A. 5). There too the indictment in a conclusory fashion alleged a conspiracy to defraud and followed this allegation with a recitation of acts of wrongdoing by the defendants instead of any specific agreement to perform the offending acts. The Court held the indictment defective, stating:

> "Confused allegations of what the defendants did are by a sort of inference sought to be made allegations of what they conspired to do, as respect sales of tires without rationing certificates. The next sentence beginning: 'And the Grand Jurors aforesaid do further charge and present, that in the acquisition of new tires and tubes the defendants made and caused to be made false and fraudulent and fictitious bills, receipts and vouchers', takes an entirely fresh start, and charges another substantive offense rather than any sort of conspiracy. Now the gist of the charge of conspiracy is the agreement to commit an offense against or a fraud on the United States. An overt act must be done pursuant to the agree-

ment before, under 18 U. S. C. A. § 88, the crime is complete, but its essence lies in the agreement. That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it. 15 C. J. S., Conspiracy, § 82; 11 Am. Jur., Conspiracy, Sect. 29; Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 S. Ct. 291, 59 L. Ed. 705; United States v. Britton, 108 U. S. 199, 2 S. Ct. 531, 27 L. Ed. 698. In the present case it is alleged generally that the defendants conspired to commit offenses and frauds, but it is not alleged what frauds were agreed to be committed. The pleader thenceforth alleges only what was done. What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven" (134 F. 2d, 595).

III

The decision of the Court of Appeals for the Seventh Circuit affirming the judgment of conviction by the Trial Court and the refusal of the Trial Court to dismiss Count I of the indictment on the grounds that the indictment was insufficient for failing to charge overt acts pursuant to the alleged conspiracy is in conflict with the decisions of this Court.

§ 371 of Title 18 specifies that an element of the crime of conspiracy is the performance of an "act to effect the object of the conspiracy". This requirement is identical with the "overt act" requirement specified in the decisions of this Court, *i.e.*, that there must be alleged in the indictment and proven overt acts in pursuance of and for the purpose of effectuating the conspiracy. *Hyde* v. *Shine*, 199 U. S. 62; *United States* v. *Hirsch*, 100 U. S. 33; *Hyde* v. *United States*, 225 U. S. 347.

The indictment here and the overt acts charged therein are insufficient under the foregoing criteria of this Court. Neither the act of petitioner in receiving a deposit of earnest money (overt act I), or in demanding and receiving additional down-payment (overt act II), or in signing as a witness and taking the acknowledgments as a notary on the bill of sale (overt act VI), or in being the scrivener of the chattle mortgage of the "personal property" (overt act VII), in any way supports the conspiracy charged of either causing a false certificate or concealing a material fact by trick, scheme or device, or both.

CONCLUSION

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its judgment and that upon such review the judgment be reversed.

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[APPENDIX FOLLOWS]